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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GAVIN B. DAVIS,

Defendant and Appellant.

D074186

(Super. Ct. Nos. SCD266332,
SCD273043)

APPEAL from a judgment of the Superior Court of San Diego County,

Timothy R. Walsh, Judge. Affirmed.

John Lanahan for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Craig H. Russell and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Gavin B. Davis appeals the denial of his motion to withdraw his guilty plea. He claims that he was not advised about and did not understand his constitutional rights; his plea was involuntary because he made it in exchange for a promise that he would be

released on bail; there was an insufficient factual basis for the crime of vandalism; and he was not advised of the collateral consequence of the possible loss of his professional license. We conclude none of Davis's arguments has merit. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In two consolidated cases (SCD266332 and SCD267655), Davis was charged with one count of vandalism over \$400 (Pen. Code,¹ § 594, subds. (a), (b)(1)); one count of resisting an officer (§ 148, subd. (a)(1)); ten counts of disobeying a court order to prevent domestic violence (§ 273.6, subd. (a)); six counts of willful disobedience of a process and order lawfully issued by a court (§ 166, subd. (a)(4)); and stalking (§ 646.9, subd. (a)).

On October 5, 2016, the court held a hearing regarding Davis's bail status. Davis's wife testified that Davis was threatening her and that Davis left a voicemail threatening to kill her father. The court found that Davis violated court orders, failed to appear at a forensic evaluation, and had threatened a protected person with great bodily injury. The court revoked Davis's bail and remanded him into custody. Davis was later released from custody after bail was reinstated.

On April 17, 2017, Davis failed to appear in court and the court issued a bench warrant. The prosecutor filed another case against Davis, alleging his failure to appear. On July 6, 2017, the bail forfeiture order was set aside, and Davis was released from custody. On October 10, 2017, Davis failed to appear in court after the trial court denied

¹ Statutory references are to the Penal Code unless otherwise stated.

a motion to continue his trial. The court forfeited bail and issued another bench warrant. Davis was arrested and remained in custody until he pled guilty on April 23, 2018.

At Davis's change of plea hearing, Davis indicated to the court that he wished to change his plea. After swearing in Davis, the court asked Davis whether he had read and understood all the plea forms. Davis admitted that his attorney "went through the forms" with him, including reading them to him. The court then asked Davis if he "thoroughly discuss[ed] all the contents with" his attorney. Davis responded that he believed his conversations with his attorney were privileged. The court pressed Davis on this point, explaining that it needed to know whether Davis thoroughly discussed the forms with his attorney, not the substance of the conversation. Davis told the court that his attorney "answered my question[.]"

The court then discussed portions of the change of plea forms, asking if Davis understood what he was pleading guilty to. Davis responded in the affirmative. The court explained that the forms stated that in exchange for his guilty plea, Davis was agreeing to probation. And if he successfully completed probation, then the felony vandalism count would be reduced to a misdemeanor and the other charges would be dismissed upon a motion by Davis. Davis indicated that his attorney had advised him consistent with what the court stated. The court asked Davis if there had been any other promises made to him or any threats made against him that caused him to plead guilty. Davis stated there had been no threats, but informed the court that he "was promised a return to my liberty today, had bail review pushed off three times." The court then added

to the plea agreement that Davis was to be released after the change of plea hearing pending sentencing.

The court and Davis then engaged in the following exchange:

"THE COURT: All right. On both forms, do you understand all of your constitutional rights to a jury trial?

"[Davis]: Your honor, I understand the rights by the California Constitution and the jurisdiction of this court.

"THE COURT: I'm asking you if you understand all of the rights as indicated that you have to a jury trial on your forms.

"[Davis]: Yes, you[r] honor.

"THE COURT: And do you give up those rights to a jury trial and all of the related rights in order to plead guilty at this time?

"[Davis]: In the state of California, San Diego County, yes, your honor."

The court later asked Davis if he understood all of the other potential consequences of his plea as indicated on the forms.² Davis said that he did "to the best of my ability and resources." Davis then pled guilty to five counts, including felony vandalism.³ Regarding the felony vandalism offense, the court and Davis engaged in the following exchange:

"THE COURT: Okay. And then on case ending 655, it says that on July 1st of 2015, you damaged property not your own in value in

² On the change of plea form, Davis initialed next to boxes indicating that he was giving up his right to specific constitutional rights, including the right to a speedy and public trial, the right to confront and cross-examine witnesses against him, the right to remain silent, and the right to present evidence on his behalf.

³ Except for the felony vandalism offense, Davis does not challenge the factual basis for his plea. As such, we omit any further discussion regarding the other offenses.

excess of \$400, count one, on March 13th of 2016 and on—is it January?

"[Davis]: Those dates are incorrect.

"THE COURT: Okay. Well, it's on or around these dates.

"[Davis]: There was only one incident and it was my own real property."

On June 7, 2018, Davis appeared at his sentencing hearing. There, his counsel indicated that Davis wanted to withdraw his guilty plea. In response to questioning by the court, Davis's counsel represented that he was prepared to go forward with sentencing and did not agree with Davis about withdrawing his guilty plea. Davis, however, attempted to address the court, which lead to the following discussion among the court, Davis, and Davis's trial counsel:

"THE COURT: Okay. Mr. Davis, you know, I know you want to address the court and are anxious to address the court. You have no right, on this issue, to address the court as you're being represented by your lawyer.

"[Davis]: I'm represented horizontally, your honor.

"THE COURT: There's no such thing. [¶] And as such, you've relayed to your attorney the basis for which you might want to withdraw your plea. He has an ethical obligation as an attorney, and because there's ethics that apply to his practice of law, to evaluate that. He cannot file frivolous motions legally or ethically, and has, based on his conversations with you, determined there's no basis for which you can withdraw your plea.

"[Davis]: I object to that. We have not discussed it.

"THE COURT: Okay. This is the deal. You can't object to it. You're not a lawyer. You're not representing yourself in this case. Your lawyer's representing yourself in this case. Your lawyer's representing yourself—you. So this idea that you feel like somehow

you are representing yourself along with your lawyer, there's no such thing. So at least in the capacity that you're here, you're not doing—I guess there is such a thing, but it's not set up that way. [¶] So do you want to be heard on this issue, defense, or do you want to proceed with sentencing?

"[Davis's counsel]: Are you referring to me, your honor? Excuse me.

"THE COURT: Yes.

"[Davis's counsel]: I'm prepared to proceed."

After the prosecutor stated he did not need to be heard on this issue, the court sentenced Davis to 365 days in local custody⁴ and three years-probation.

Davis obtained a certificate of probable cause and filed a timely notice of appeal.

DISCUSSION

A guilty plea must be knowing, voluntary, and intelligent under the totality of the circumstances. (*People v. Farwell* (2018) 5 Cal.5th 295, 301-302.) Upon a showing of good cause, the court may allow a defendant to withdraw a plea of guilty at any time before judgment. (§ 1018.) To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. (*Ibid.*; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) The defendant must also show prejudice in that he would not have accepted the plea bargain had it not been for the error. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416.) On appeal, we affirm the trial court's ruling on a motion to withdraw the plea unless the defendant shows a clear abuse of the trial court's discretion. (*People v. Fairbank* (1997)

⁴ At the time of his sentencing, Davis had a total of 401 days of credit.

16 Cal.4th 1223, 1254.) In evaluating challenges to the court's ruling, we "must adopt the trial court's factual findings if substantial evidence supports them." (*Ibid.*; *Breslin*, at p. 1416.) We are bound by the trial court's credibility determinations. (See *Fairbank*, at p. 1254.)

Here, Davis claims the trial court abused its discretion in denying his motion to withdraw his guilty plea because: (1) the record does not indicate that he knowingly waived his constitutional rights, (2) the plea was made in exchange for a promise that he would be released on bail, (3) there was an insufficient factual basis for the crime of vandalism, and (4) Davis was not advised of the collateral consequence of the loss of a professional license. We conclude that these arguments lack merit.

Davis first argues that he did not knowingly waive his constitutional rights. To this end, he points out that during his change of plea hearing, the court only explicitly identified the right to trial by jury.⁵ He therefore claims the record does not indicate that he was apprised of his constitutional rights and then knowingly waived them. We disagree.

There is no requirement for a talismanic recitation of the right being waived. (*People v. Howard* (1992) 1 Cal.4th 1132, 1180 (*Howard*).) Instead, the knowing nature of the waiver must be determined from the totality of the circumstances. (*People v.*

⁵ Davis argues that he must be informed of and then knowingly and intelligently waive the right against self-incrimination, the right to trial by jury, and the right to confront one's accusers. (See *Boykin v. Ala.* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132.)

Davis (2009) 46 Cal.4th 539, 586; *People v. Mosby* (2004) 33 Cal.4th 353, 361 (*Mosby*); *Howard*, at pp. 1177-1178.) Explicit advisal of the right being waived is not necessary for a knowing and voluntary plea. (*Howard*, at pp. 1177-1178 [plea valid even though no explicit advisal of constitutional right].)

Further, the court may rely on a validly executed waiver form as a sufficient advisal of rights. (*People v. Cisneros-Ramirez* (2018) 29 Cal.App.5th 393, 402-403; *Mosby, supra*, 33 Cal.4th at pp. 360-361.) The court need not specifically review the waiver with the defendant when both the "defendant and his attorney have signed a waiver form, both have attested to defendant's knowing and voluntary relinquishment of his rights, and the trial court's examination of the defendant and his attorney raised no questions regarding the defendant's comprehension of his rights or the consequences of his plea." (*Cisneros-Ramirez*, at p. 402; *People v. Panizzon* (1996) 13 Cal.4th 68, 83-84.)

We independently examine the entire record to determine whether the defendant knowingly and voluntarily waived his rights. (*People v. Elliott* (2012) 53 Cal.4th 535, 592.)

Davis's waiver of his constitutional rights was intelligent and voluntary. The language of the change of plea form was clear. The form stated that Davis had "the right to a speedy and public trial by jury[.]" "the right to confront and cross-examine all the witnesses against" him, "the right to remain silent[.]" and "the right to present evidence in [his] behalf." After each recitation of the specific right, the form indicated, in bold, "I now give up this right" with a box for Davis's initials. Davis initialed every box and then

signed the form under penalty of perjury. The form also contained the following paragraph:

"I, the attorney for the defendant in the above-entitled case, personally read and explained to the defendant the entire contents of this plea form and any addendum thereto. I discussed all charges and possible defenses with the defendant, and the consequences of this plea. **I have asked the defendant about his/her immigration status, advised defendant of the immigration consequences of this plea to the best of my ability, and advised defendant of the right to additional time to discuss this matter with an immigration attorney.** I personally observed the defendant fill in and initial each item, or read and initial each item to acknowledge his/her understanding and waivers. I observed the defendant date and sign this form and any addendum. I concur in the defendant's plea and waiver of constitutional rights."

Davis's attorney signed the form after that paragraph.

In addition to being advised of his constitutional rights in writing, the court asked Davis if he understood his constitutional rights and whether he was waiving them. Davis answered both questions in the affirmative. Further, Davis does not argue that he did not read or understand the change of plea form. Nor is there any indication in the record that Davis suffered from some impairment that limited his ability to understand what he was signing or agreeing to. In contrast, the record indicates that Davis was an Ivy League educated person with extensive business experience. Against this backdrop, the totality of the circumstances strongly supports the conclusion that Davis knowingly and intelligently waived his constitutional rights. (See *People v. Davis*, *supra*, 46 Cal.4th at p. 586; *Mosby*, *supra*, 33 Cal.4th at p. 361; *Howard*, *supra*, 1 Cal.4th at pp. 1177-1178.)

Davis next argues his plea was not voluntary because he claims he pled guilty based on the promise that he would be released on bail if he did so. He claims that the

"real" reason he pled guilty was to be released on bail. Davis argues that he tried unsuccessfully to get a bail review calendared three times in six months, and thus, he believed pleading guilty was the only way he would be released from jail. We disagree.

During the change of plea hearing, Davis indicated that the prosecutor had agreed that he was to be released, after pleading guilty, "pending sentencing." The court then added this agreement to the change of plea form. Moreover, Davis indicated to the court that he was not pleading guilty in response to any threats. And, on the change of plea form, Davis initialed in the box next to the statement, "I am entering my plea freely and voluntarily, without fear or threat to me or anyone closely related to me." Based on the prosecution's offer to release Davis after he pled guilty pending sentencing, Davis maintains that his plea was involuntary under *People v. Collins* (2001) 26 Cal.4th 297 (*Collins*).

In *Collins*, after the trial court learned the defendant might waive a jury trial, the court informed defense counsel " 'there might well be a benefit in it,' because 'just by having waived jury' and thus not taking two weeks' time to try the case, 'that has some effect on the court.' " (*Collins, supra*, 26 Cal.4th at p. 309.) The court then informed the defendant he would receive a benefit of an unspecified nature if he waived his right to a jury trial. The court secured the defendant's response that he understood the court's comments. (*Ibid.*)

The California Supreme Court observed "[t]he trial court, by following that procedure while announcing its intention to bestow some form of benefit in exchange for defendant's waiver of that fundamental constitutional right, acted in a manner that was at

odds with its judicial obligation to remain neutral and detached in evaluating the voluntariness of the waiver." (*Collins, supra*, 26 Cal.4th at p. 309.) The court determined "[t]he form of the trial court's negotiation with defendant presented a 'substantial danger of unintentional coercion.' " (*Ibid.*) The court further noted the waiver of the fundamental right of a jury trial is not by itself subject to negotiation by the trial court. "In effect, the trial court offered to reward defendant for refraining from the exercise of a constitutional right." (*Ibid.*) The court concluded the error was structural error, not subject to harmless error analysis and compelled reversal of the judgment. (*Id.* at pp. 310-313.)

In *Collins*, unlike in the present case, the trial court offered the defendant a vague promise of leniency to induce a waiver of the defendant's right to a jury trial to save judicial resources. (*Collins, supra*, 26 Cal.4th at pp. 300, 309, 312.) Here, the trial court did not make any offer or promise of leniency to entice Davis to plead guilty. Glossing over this distinction, Davis focuses on the prosecutor's offer to release him from custody pending sentencing. Davis now claims that he only agreed to this offer because he believed it was the only way he would be released. To this end, he tries to paint his three unsuccessful attempts to schedule bail review as a nefarious plot to coerce him to plead guilty. However, there is no support in the record for this assertion. Davis points to nothing in the record explaining why his attempts to schedule a bail review were not successful. Additionally, Davis's argument ignores his role in the court revoking his bail: he did not comply with certain court orders, including failing to appear in court. In short, the prosecutor's offer to allow Davis to be released from custody pending

sentencing is nothing like the trial court's vague offer of leniency our high court found improper in *Collins, supra*, 26 Cal.4th 297.

Here, Davis was represented by counsel and knew of the charges against him. There is no indication in the record that his plea was induced by harassment, threats of physical harm, coercion, or misrepresentation. He admitted as much during his change of plea hearing and when he initialed and signed his change of plea form. The prosecutor's offer to allow Davis to be released from custody after the change of plea hearing did not render Davis's guilty plea involuntary.

Davis also contends his plea should be vacated because the trial court failed to establish an adequate factual basis for the plea. We disagree.

"[T]he trial court is required by statute to conduct an inquiry to establish the existence of a factual basis for a conditional plea of guilty or no contest." (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1365 (*Voit*).) " 'While there is no federal constitutional requirement for this factual basis inquiry, the statutory mandate of section 1192.5 helps ensure that the "constitutional standards of voluntariness and intelligence are met." [Citation.]' [Citation.] The inquiry also protects against an innocent person entering a guilty plea and creates a record against possible appellate or collateral attack. [Citation.]" (*Voit*, at p. 1365, fn. omitted.)

"However, a plea of guilty . . . waives an appellate claim of the nature 'there is insufficient evidence supporting my plea.' " (*Voit, supra*, 200 Cal.App.4th at p. 1365.)

"[A] plea of guilty . . . forecloses an appellate challenge that the plea lacks a factual basis. Section 1192.5 requires a factual inquiry by the trial court, not by the appellate court.

Particularly where a defendant not only personally pleads . . . but also personally or through counsel concedes the existence of a factual basis for his or her pleas" (*Voit*, at p. 1366.) A defendant is estopped from arguing on appeal what he has already conceded below, that there is a factual basis for his plea. (*Id.* at p. 1359.)

" 'As to the merits, the plea is deemed to constitute a judicial admission of every element of the offense charged. [Citation.] Indeed, it serves as a stipulation that the People need introduce no proof whatever to support the accusation: the plea ipso facto supplies both evidence and verdict. [Citation.]' " (*Voit, supra*, 200 Cal.App.4th at p. 1363.) " 'A guilty plea "admits every element of the crime charged" [citation] and "is the 'legal equivalent' of a 'verdict' [citation] and is 'tantamount' to a 'finding' [citations]" [citation].' [Citation.]" (*Id.* at p. 1364.) " ' "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." [Citation.]' " (*Id.* at pp. 1363-1364.) "Issues concerning the defendant's guilt or innocence are not cognizable on appeal from a guilty plea. [Citations.] By admitting guilt a defendant waives an appellate challenge to the sufficiency of the evidence of guilt. [Citations.]" (*Id.* at p. 1364.)

"It is our position that an appellate court should not engage in a substantive review of whether there is an evidentiary or factual basis for a defendant's . . . plea simply because the defendant contradicts on appeal what he admitted in the trial court. The doctrine of judicial estoppel appears apt." (*Voit, supra*, 200 Cal.App.4th at p. 1370 [declining to review the preliminary hearing transcript and police report, to which defendant stipulated would provide the factual basis for the plea, to determine whether

there was sufficient evidence to support the crimes to which defendant pled no contest]; *People v. Nitschmann* (2010) 182 Cal.App.4th 705, 709 ["Appellant is estopped from attacking a procedure to find a factual basis for the plea that he agreed could be utilized."]; *People v. Borland* (1996) 50 Cal.App.4th 124, 127 ["Appellant may not enter into a negotiated disposition for an offense with a specified charging date, enjoy the fruits thereof, and then challenge the factual basis for the plea on appeal."].)

The court in *Voit* recognized that the court in *People v. Marlin* (2004) 124 Cal.App.4th 559, cited by Davis in his reply brief, provided contrary authority.⁶ However, the *Voit* court rejected *Marlin* on several bases: *Marlin* was dictum because the People did not contend the appellate court was precluded from considering the factual basis for the plea, the issue was not contested, there was no attempt to distinguish authority holding that the sufficiency of the evidence of guilt was cognizable on an appeal, and that *Marlin's* determination that holding otherwise would make the issue unreviewable was inconsequential considering the same could be said of any issue which courts have determined a defendant can waive or forfeit. (*Voit, supra*, 200 Cal.App.4th at p. 1368.) We agree with the court in *Voit* that *Marlin* consists largely, if not wholly, of distinguishable dictum and is therefore not persuasive.

⁶ In his opening brief, Davis devotes a single paragraph of his 22 page brief to his argument that a factual basis does not support his guilty plea to the vandalism offense. He does not discuss *Voit, supra*, 200 Cal.App.4th 1353 or *People v. Marlin, supra*, 124 Cal.App.4th 559. Nor does he cite to any case law to support his position whatsoever. Instead, he merely focuses on a single response he made to the trial court during his change of plea hearing. In doing so, he ignores the rest of the record that undercuts his position here.

Yet, even if we did reach the merits of Davis's claim, we would find his position not well taken. Davis relies entirely on his exchange with the trial court wherein the court asked him if he damaged property not his own in excess of \$400, and Davis responded, "There was only one incident and it was my own real property."⁷ Davis ignores the change of plea form where he initialed a box next to the admission that he damaged property not his own in excess of \$400. Thus, at most, his statement to the trial court might be considered a contradiction of the signed change of plea form.

However, it is clear from the record that Davis's statement is not inconsistent with the vandalism offense. The prosecution's theory of the case was that Davis and his wife jointly owned the damaged property (their home). And the probation report indicates that the vandalism offense was based on Davis damaging portions of his home that he owned with his ex-wife. Each community property owner has an equal ownership interest and, although undivided, one which the criminal law protects from unilateral nonconsensual damage or destruction by the other marital partner. (*People v. Kahanic* (1987) 196 Cal.App.3d 461, 466.) Davis may have damaged his "own real property" but, at the same time, he also damaged his wife's interest in that property. Thus, the statement he made during his change of plea hearing did not negate the factual basis of the vandalism offense. We therefore are satisfied that there existed an adequate factual basis for Davis's guilty plea.

⁷ In his reply brief, Davis misquotes himself, stating that he said he damaged his "own personal property."

Finally, Davis claims that the trial court should have allowed him to withdraw his guilty plea because he was unaware a felony conviction might preclude him from renewing his real estate license. Davis concedes that a loss or suspension of his professional license would be a collateral consequence of his guilty plea. Thus, he argues his guilty plea should not stand because he was not advised of a potential collateral consequence of pleading guilty.

In a guilty plea case, the defendant must be advised of all direct consequences of conviction. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) This requirement relates to the primary and direct consequences involved in the criminal case itself and not to secondary, indirect or collateral consequences. (*People v. Gurule* (2002) 28 Cal.4th 557, 634; *People v. Harty* (1985) 173 Cal.App.3d 493, 504.) A consequence is " 'direct' " if it has a definite, immediate and largely automatic effect on the range of the defendant's punishment. (*People v. Moore* (1998) 69 Cal.App.4th 626, 630.) Direct consequences include the permissible range of punishment provided by statute, imposition of a restitution fine, probation ineligibility, the maximum parole period, and registration requirements. (*Ibid.*)

"A collateral consequence is one which does not 'inexorably follow' from a conviction of the offense involved in the plea." (*People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355.) Collateral consequences include the possibility of enhanced punishment upon a future conviction, the possibility of probation revocation in another case, and limitations on the ability to earn conduct and work credits while in prison. (*People v. Moore, supra*, 69 Cal.App.4th at p. 630.)

Here, Davis acknowledges the loss of his real estate license would be a collateral consequence of his guilty plea. We agree. The California Real Estate Commissioner may suspend, revoke, or delay the renewal of a license of a real estate licensee who has entered a plea of guilty of "a felony, or a crime substantially related to qualifications, functions, or duties of a real estate licensee" (Bus. & Prof. Code, § 10177, subd. (b)(1).) Davis concedes that it is unknown whether his conviction would delay the renewal of his license. Further, Davis cannot point to any authority that would require that he be advised of the potential of losing a professional license before a guilty plea can be knowing and intelligent. He cites *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*) in arguing that the effect of losing his professional license and thus losing his primary means of earning a livelihood is so severe that the direct/collateral consequences distinction does not matter. That case does not help Davis.

In *Padilla*, the court determined that a criminal defense counsel's Sixth Amendment obligation include properly advising his or her client of the immigration consequences of a guilty or no contest plea. The court recognized that federal immigration law is often complex; thus, at times, deportation as a consequence of a conviction is neither clear nor certain. In those cases, the court concluded, the most the Sixth Amendment may require of defense counsel concerning immigration consequences is a warning that a criminal conviction may have adverse immigration consequences. (*Padilla, supra*, 559 U.S. at p. 369.) However, when, as was the case in *Padilla*, federal immigration law specifies in "succinct, clear, and explicit" terms that a conviction will result in deportation, the Sixth Amendment requires the criminal defense attorney to

accurately advise his or her client of that consequence before the client enters a guilty plea. (*Padilla*, at pp. 368-369.) Davis is not claiming that his attorney did not advise him of the potential immigration consequences of pleading guilty. Instead, he is claiming his attorney should have advised him of the possibility that he may lose his real estate license if he pled guilty. *Padilla* does not establish any such requirement.

Davis also claims his trial counsel was constitutionally ineffective because he did not advise him of the possibility that he would not be able to renew his real estate license if he pled guilty. To show that trial counsel's performance was constitutionally defective, an appellant must prove: (1) counsel's performance fell below the standard of reasonableness, and (2) the "deficient performance prejudiced the defense."

(*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice.

(*People v. Ray* (1996) 13 Cal.4th 313, 349; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.)

An appellate court generally cannot fairly evaluate counsel's performance at trial based on a silent record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) In many instances, like here, evaluation of a claim of ineffective assistance of counsel will have to await a petition for habeas corpus, should the defendant believe there is a viable claim that can be pursued. (*Ibid.*) Davis has not provided any authority establishing that an attorney has the obligation to advise his or her client that the client may lose or not be able to renew a professional license if the client pleads guilty to a felony. Moreover, there is no evidence in the record establishing that the giving of such advice was the

custom, habit, or practice of defense counsel in San Diego county. Accordingly, we conclude that Davis's claim of ineffective counsel is without merit.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.